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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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INLAND PAPERBOARD AND PACKAGING,)
INC. f/k/a INLAND CONTAINER CORP.,)

Complainant,)

v.)

No. 00-0385

COMMONWEALTH EDISON COMPANY,)

Respondent.)

Complaint as to Municipal Taxes and)
Franchise Costs improperly charged to the)
complainant in Leyden Township, Illinois.)

**INLAND PAPERBOARD AND PACKAGING, INC.'S REPLY TO COMMONWEALTH
EDISON COMPANY'S MEMORANDUM IN RESPONSE TO INLAND PAPERBOARD
AND PACKAGING, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Now comes the Complainant, Inland Paperboard and Packaging, Inc. ("Inland"), by and through its attorneys, Williams Montgomery & John Ltd., respectfully submits its Reply to Commonwealth Edison Company's ("ComEd") Memorandum in Response to Inland's Motion for Partial Summary Judgment. For the reasons set forth below, this Commission should find in favor of Inland and grant its Motion for Partial Summary Judgment.

FACTS

In 1957, Inland Container Corporation purchased a plot of land at 11600 W. Grand Avenue in unincorporated Leyden Township for the purposes of constructing a manufacturing plant known as Inland Container Corporation, later known as Inland Paperboard and Packaging, Inc. which manufactures corrugated boxes and other packaging goods. Shortly thereafter, Inland initiated service with ComEd to supply electrical power to this facility. Inland has continuously

operated this manufacturing facility located at 11600 W. Grand Avenue, Leyden Township without interruption.

Inland is situated in an area, which has been unincorporated during all times referred to in its complaint. Inland, since its inception, was a customer of ComEd including the period from December 5, 1989 through October 30, 1997. Each of the billing statements rendered by ComEd to Inland during the period complained of identified Inland's service address as "11600 W. Grand Avenue, Leyden Township". (See Exhibit A, Copies of ComEd billing statements for the periods 8/30/96 through 10/30/97.) Moreover, Inland's same service address was also identified by ComEd as "11600 W. Grand Avenue, Leyden Township" before and after the period complained of by Inland. (See Exhibit B, Copies of ComEd billing statements for the periods 12/6/88 through 9/5/89 and see Exhibit C, Copies of ComEd billing statements for the periods 10/30/97 through 6/3/98.)

During the time period in question, an Ordinance Establishing A Municipal Utility Tax Within The Village Of Franklin Park No. 8990 G 12 (1989) was in effect. The ordinance permitted ComEd to impose a Municipal Tax upon those customers of electricity "... within the corporate limits of the Village of Franklin Park . . .". (Ordinance attached hereto as Exhibit D.) ComEd was authorized to impose such taxes pursuant to 220 ILCS 5/9-221 only against those customers located within the municipal boundaries of the Village of Franklin Park. However, prior to correcting their error, ComEd continuously charged and collected Village of Franklin Park Municipal Taxes and Franchise Costs against Inland, which was clearly not located within Franklin Park's boundaries. (See Exhibits A & B.) Because Inland was not located within the incorporated limits of the Village of Franklin Park, ComEd was not authorized to collect such Municipal Taxes and Franchise Costs from Inland. On October 30, 1997, ComEd found its error

and unilaterally, without notice to Inland, removed these improper charges from their billing statements, hiding their error.

Upon learning that ComEd had wrongfully imposed charges for a Municipal Tax and Franchise Costs, Inland promptly filed an Informal Complaint on September 15, 1999 seeking a refund for these improper charges. Due to ComEd's inaction and denial of culpability, Inland was forced to file a Formal Complaint on May 26, 2000, which it subsequently amended on June 23, 2000 to correct a typographical error. ComEd has not answered Inland's Formal Complaint or Amended Formal Complaint and has only moved to dismiss only a portion of Inland's Formal Complaint based upon a time limitation argument.

Inland is now seeking a refund, plus interest, for those payments made on Municipal Tax charges from September 15, 1996 through October 30, 1997 in the amount of \$22,005.88; and for payments made on Franchise Cost charges from April 4, 1995 through October 30, 1997 in the amount of \$2,165.65. In addition, the Commission, pursuant to 83 Ill. Adm. Code § 280.70(e)(1) should compute interest due on these payments.

ARGUMENT

I. ComEd admits it wrongfully charged Inland Franchise Costs and Municipal Taxes.

ComEd, in their Motion to Dismiss Inland Paperboard and Packaging, Inc.'s Amended Complaint, admits that in charging Inland for Municipal Tax and Franchise Cost, it committed an illegal or unconstitutional act. ComEd argues that a portion of Inland's complaint is time barred by 735 ILCS 5/13-224. On October 25, 2000, this Commission granted ComEd's motion, finding that 735 ILCS 5/13-224 applied. Notably, this section only applies to the recovery of charges that were illegally or unconstitutionally collected by a public utility. Therefore in arguing in favor of the application of Section 13-224, ComEd must admit that charging Inland Municipal Taxes and Franchise Costs was either and illegal or unconstitutional act. In either

instance, ComEd has clearly admitted that what they did was wrong. As such, ComEd admitted their own wrong doing in their Motion to Dismiss. Further, ComEd, by its own admissions and arguments in support of its Motion to Dismiss, established that its actions were either illegal or unconstitutional in levying these charges, thus invoking Section 13-224.

ComEd cannot now attempt to argue in their Response to Inland's motion for summary judgment that it did nothing wrong and that Inland must be the one at fault. ComEd's position in their Response is completely opposite that which it relied upon in its motion to dismiss. A respondent can not cloak itself with one argument to favor one position, and then discard it in favor of a contrary position. In doing so, ComEd has effectively challenged its prior argument. Therefore, based upon its Motion to Dismiss, ComEd has admitted wrongdoing by charging Inland Municipal Taxes and Franchise Costs, which it was not authorized to do so. Notably, Inland does not waive its prior objection to the application of Section 13-224.

II. ComEd wrongfully imposed and charged Municipal Taxes and Franchise Costs against Inland and knew Inland was not subject to such charges.

Inland alleged in its Motion for Partial Summary Judgment that because it was not located within the municipal boundaries of the Village of Franklin Park, they were exempt from being charged Municipal Taxes and Franchise Costs pursuant to Village of Franklin Park ordinance No. 8990 G 12 (1989). Only those residents located within the subject municipal boundaries may be charged for cost-recovery, to do otherwise would be unjust. City of Chicago v. Illinois Commerce Comm'n, 281 Ill.App.3d 617, 625, 666 N.E.2d 1212 (1st Dist. 1996); City of Elmhurst v. Western United Gas & Electric Co.U, 363 Ill. 144, 147, 1 N.E.2d 489 (Ill. 1936); Village of Maywood v. Illinois Commerce Comm'n, 23 Ill.2d 447, 451, 178 N.E.2d 345 (1st Dist. 1961). Accordingly, because Inland's facility at 11600 West Grand Avenue, Leyden Township, Illinois was never located with the boundaries of the Village of Franklin Park, or any

other municipality for matter, ComEd improperly charged Inland Municipal Taxes and Franchise Costs in violation of the Village ordinance, Section 5/9-221 of the Public Utilities Act as well as public policy.

ComEd, in its Response, initially argues that Inland had failed to present evidence in support of its motion. This is not true. Alternatively, ComEd also argues that it did nothing wrong because Inland must have given ComEd incorrect information regarding their location and therefore it should be absolved from responsibility for improperly charging Inland Municipal Taxes and Franchise Costs for nearly eight years. This argument is completely unsupported and belies the clear and obvious evidence presented in this case.

A. The evidence presented clearly demonstrates Inland is located in unincorporated Leydn Township and is undisputed.

The indispensable facts of this case are undisputed. Inland Paperboard and Packaging, Inc. f/k/a Inland Container Corporation is located at 11600 W. Grand Avenue, Leyden Township, Illinois. This fact is not in dispute. The Village of Franklin Park Ordinance No. 8990 G 12 (1989) only permits ComEd to impose Municipal Taxes and Franchise Fees upon those customers of electricity located "...within the corporate limits of the Village of Franklin Park..." (See Exhibit D.) This fact is not in dispute. Furthermore, each billing statement rendered by ComEd clearly stated Inland's correct service address as "11600 W. Grand Ave, Leyden TWP"; and therefore Inland had no reason to believe their account information was incorrect. As such, there is clearly no issue of fact that Inland was not subject to Municipal Taxes or Franchise Costs for the Village of Franklin Park. No other reasonable inference or conclusion could be determined from these undisputed facts. Therefore, no issue of fact exists whether ComEd improperly charged Inland Municipal Taxes and Franchise Costs. Summary judgment is appropriate when there is no genuine issue as to any material fact when construed in the light most favorable to the nonmoving party and the moving party is entitled to judgment as a matter

of law. See 735 ILCS 5/2-1005(c); LaFever v Kemlite Co., 185 Ill.2d 380, 388, 706 N.E.2d 441 (Ill. 1998). Based upon the undisputed evidence in this case, there is no issue of fact precluding summary judgment in this case.

B. ComEd knew or should have known that Inland was not located within the Village of Franklin Park.

Inland strongly rejects ComEd's assertion that it provided ComEd with incorrect information regarding its location. ComEd suggests, in their response, that if Inland was improperly billed for Village of Franklin Park Municipal Tax and Franchise Costs, it must be because Inland did not provide the correct information regarding its location. In doing so, ComEd relies on a document entitled "Information and Requirements for the Supply of Electric Service" (referred to as the "Rule Book") which became effective on March 15, 1989 and was filed with the Commission as Ill.C. C. No. 9. (See Exhibit A of ComEd's Response Memorandum). Notably, ComEd has failed to attach any supporting documents specifically regarding Inland's initiation of service for their facility located 11600 W. Grand Avenue, Leyden Township, Illinois.

First, ComEd reliance on the aforesaid document is erroneous because Inland initiated service with ComEd on or about 1957, well before the effective date of March 15, 1989 for this document. There is no evidence to suggest that the RuleBook even existed at the time Inland initiated service, or that similar procedures were in use at the time Inland initiated service. As such, ComEd's usage of this document to support their unfounded assertion is incompetent as evidence and merely a red herring to divert this Commission's attention for the clear facts of this case. Similarly, ComEd's reliance on the Declaration of Robert L. Jacobs (See Exhibit B of ComEd's Response Memorandum) is also incompetent as evidence because there is nothing to suggest that Mr. Jacobs was ever involved in any way with the initiation of service for Inland or

is familiar with the facts regarding Inland's initiation of service. Therefore, ComEd had failed to put forth any evidence to suggest that Inland provided incorrect information to ComEd at the time it initiated service. Those documents upon which ComEd relies should be ignored by this Commission as there is no showing that they are in any way relevant to this matter.

Secondly, ComEd's own Electric Service Bills clearly show that it knew Inland's service address was "11600 W. Grand Ave., Leyden TWP" as it appears on each and every statement for the period Inland is contesting as well as before and after that same period. (See Exhibits A, B & C.) ComEd's assertion that it was not provided the proper information regarding Inland's location is clearly contradicted by its own billing statements. There can be no other interpretation from the face of these statements; other than to conclude that ComEd knew Inland was located in unincorporated Leyden Township.

ComEd admits that Inland provided the correct information and relied on that information. ComEd, in its response, states "...the only way that ComEd could know Inland's location was through information provided by Inland." (See ComEd's Response Memorandum, p. 6.) Therefore, Inland must have provided ComEd with the correct information since ComEd correctly listed Inland's service address as "11600 W. Grand Ave., Leyden TWP" on each and every billing statement. Accordingly, ComEd can not now deny or otherwise suggest that Inland misinformed them about their exact location. Furthermore, as ComEd admits in its response, "...ComEd does not obtain information regarding a customer's location independently; the information comes from the customer itself." (See ComEd's Response Memorandum, p.5.) As such, the only means by which they could have received Inland's correct service address is from Inland itself. Therefore, it is clear from ComEd's own billing statements that Inland provided the correct information regarding its location and that ComEd knew of this information and relied upon it.

Based upon the undisputed evidence in this case, it is clear that Inland provided ComEd with correct information about its service address. Since ComEd is responsible for assigning its customers account numbers, which include the "town code", one can only conclude that ComEd failed to assign the proper coding after it was given the proper information. In using ComEd's own argument, if a customer has a responsibility for providing ComEd correct information, the corollary must be that ComEd is charged with the responsibility of correctly imputing such information and determining the correct town code. In this case, ComEd was given the correct information and by its own error misrepresented this information by incorrectly assigning Inland the wrong town code. As such, ComEd has acted in contravention of its own policy and procedures, to the detriment of its customer, Inland.

Therefore, ComEd has failed to set forth any evidence to refute Inland's argument that it was improperly charged Municipal Taxes and Franchise Costs. ComEd's own billing statements speak for themselves and clearly establish that Inland provided correct information about its address and that ComEd knew this information and relied upon it. Aside from the lack of relevance and evidentiary foundation, ComEd's exhibits only bolster Inland's argument that it provided the correct information, otherwise there is no explanation as to how ComEd had the correct service address. As such, Inland is entitled to a refund of all Municipal Taxes paid from September 15, 1996 through October 30, 1997 and Franchise Costs paid from April 4, 1995 through October 30, 1997 which were improperly charged by ComEd.

C. Estoppel is inapplicable in this case.

ComEd next argues that Inland should be estopped from asserting their claim because they knowingly misled ComEd by providing incorrect information regarding their location. Not only does the evidence in this case support the opposite conclusion; such an assertion is illogical, as no commercial business would knowingly substantially increase its costs without any benefit.

Essentially, ComEd is asking this Commission to believe that Inland knowingly provided false information to ComEd, expecting ComEd to rely upon it, so that it could be charged erroneous costs from which it derived no benefit.

As argued above, the undisputed evidence in this case clearly establishes that Inland provided the correct information regarding its location in Leyden Township. The evidence clearly shows that each of Inland's bills had the correct service address in Leyden Township. Furthermore, because ComEd unilaterally assigns customer-account numbers, only their mistake could be responsible for the misrepresentation. Based upon this evidence, ComEd's estoppel argument fails because there is no evidence that Inland misrepresented material facts to ComEd regarding its location. While this evidence is enough to bar respondent's argument we must also point out that Inland is clearly the one who has been prejudiced. But for ComEd's improper assignment of account numbers, Inland would not have had to pay wrongfully imposed Municipal Taxes from December 5, 1989 through October 30, 1997 and Franchise Costs from April 4, 1995 through October 30, 1997. Clearly, Inland has suffered the inequity of ComEd's misrepresentations.

III. Inland is entitled to a full refund of all payments plus interest for improper charges pursuant to Sections 280.75 and 280.76 of the Illinois Administrative Code.

Certain Municipal Taxes are imposed on sellers of electricity, such as ComEd, who are authorized to then pass those taxes on to customers. *See* 220 ILCS 5/9-221; ComEd Rider 23. The Village of Franklin Park established the collection of such taxes in Ordinance No. 8990 G 12 (1989); but only for businesses located within its area of incorporation. (See Ex. D.) Therefore, where a utility passed such taxes through to a customer located outside of the incorporated area, the utility has violated both the municipal ordinance as well as the statute authorizing the pass through of those taxes.

The Illinois Commerce Commission has provided a mechanism for the refund of all such charging errors pursuant to 83 Ill. Adm. Code § 280.75. Section 280.75, "REFUNDS", states:

"a) In the event that a customer pays a bill as submitted by the utility and the billing is later found to be incorrect due to an error either in charging more than the published rate, in measuring the quantity or volume of service provided, or in charging for the incorrect class of service, the utility shall refund the overcharge with interest from the date of overpayment by the customer.

b) The interest rate shall be the rate as established by the Commission to be paid on deposits in Section 280.70(e)(1) of this part.

c) The refund shall be accomplished by the Commission either by a credit on a subsequent bill for service or by a check if the account is final or if so requested by the customer."

83 Ill. Adm. Code 280.75.

In this case, ComEd charged for the incorrect class of service because it classified Inland as being within the municipal boundaries of the Village of Franklin Park, which it clearly was not. As a consequence, Inland was improperly charged a Municipal Tax and a Franchise cost. As provided above, Inland is entitled to a refund with interest.

In addition, 83 Ill. Adm. Code 280.76 provides for refunds of incorrectly calculated charges pursuant to Section 9-221 or Section 9-222 of the Public Utilities Act. Section 280.76, "REFUNDS OF ADDITIONAL CHARGES", states:

"In the event that the Commission orders a public utility to refund incorrectly calculated additional charges made pursuant to Section 9-221 or Section 9-222 of the Public Utilities Act, the public utility shall pay interest on such refund and the rate established by the Commission to be paid on deposits in 83 Ill. Adm. Code 280.70(e)(1)."

83 Ill. Adm. Code 280.76.

Section 280.76 directly addresses Section 9-221 where a public utility incorrectly levied additional charges upon a customer such as Inland. In such instances, the above administrative code mandates that the utility must refund all over-charged amounts, with interest.

Therefore, where a customer has established that it was improperly charged by a utility, the utility must fully refund all amounts relating to such charges plus interest as determined by the Commission. There is no issue of fact that Inland was improperly charged a Municipal Tax and Franchise Cost by ComEd when Inland was clearly exempt from such charges. ComEd, by unilaterally removing these improper charges from Inland's billing statement on 10/30/97, admitted that such charges were improper and in violation of the legislative scheme. As such, Inland is entitled to a full refund for payments made on these charges from the period September 15, 1996 through October 30, 1997 for Municipal Tax and the period April 4, 1995 through October 30, 1997 for Franchise Costs.

IV. Inland is entitled to a full refund of all payments plus interest for improper charges pursuant to 220 ILCS 5/9-252 and 220 ILCS 5/9-252.1.

Section 220 ILCS 5/9-252 of the Public Utilities Act, which applies to actions for recovery of excessive or unjustly discriminatory amounts charged for its commodity, product or service, applies to Inland's claim as well and allows for a full refund with interest. Section 5/9-252 states:

When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefore, with interest at the legal rate from date of payment of such excessive or unjustly discriminatory amount.

220 ILCS 5/9-252.

ComEd's collection of Municipal Taxes and Franchise Costs was both excessive and unjustly discriminatory. First, ComEd's collection of a Municipal Tax and a Franchise cost from Inland was excessive because such taxes only apply to businesses situated in incorporated areas. Collection of erroneous fees from a business situated in an unincorporated area result in an excessive amount being charged for the utility's service.

Secondly, ComEd's collection of a Municipal Tax and a Franchise Cost from Inland was unjustly discriminatory because other businesses similarly located in unincorporated Leyden Township were not subjected to such taxes. Norkol, Inc., a manufacturing facility, located at 11650 W. Grand Ave., Leyden Township, is situated directly north from Inland. Upon information and belief, no charges for a Municipal Tax or a Franchise cost were levied on this facility. In contrast, on information and belief, Norkol's corporate offices located across the street at 1240 and 1250 Garnet Drive, Northlake, Illinois, which were situated within the incorporated limits of Northlake, were properly charged a Municipal Tax and Franchise cost. ComEd therefore has shown that it knew that businesses located in unincorporated areas were not subject to a Municipal Tax or Franchise cost; and further that they were able to make such distinctions. It is clear that Inland was singled out from other similarly situated businesses in unincorporated Leyden Township, which is discriminatory on its face. Therefore, Section 5/9-252 applies to this action.

Similarly, 220 ILCS 5/9-252.1 of the Public Utilities Act also applies to this action.

Section 5/9-252.1 states that:

When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error in either charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest from the date of overpayment at the legal rate or the rate prescribed by rule of the Commission. . . . Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing.

220 ILCS 5/9-252.1.

Clearly, ComEd incorrectly charged Inland for erroneous taxes and costs due to an error in the billing process, which did not recognize Inland as being located in an unincorporated area. It is undisputed that Inland was located in an unincorporated area, which makes it exempt from

paying a Municipal Tax and a Franchise Cost. As such, there is no issue of fact in dispute; thus Inland is entitled to a refund of payments made regarding these erroneous charges.

Both the Administrative Code of the Illinois Commerce Commission and the Public Utilities Act are symmetrical in that they both address actions where a utility has erroneously charged a customer and they both prescribe a full refund plus interest to be computed pursuant to Section 280.70(e)(1). Based upon the undisputed facts in this case, ComEd's imposition of Municipal Taxes and Franchise Costs on Inland was improper. Therefore, summary judgment in favor of Inland's claim should be granted.

Conclusion

It is undisputed that Inland was never located within the incorporated boundaries of the Village of Franklin Park. It is undisputed that Franklin Park Ordinance No. 899 G 12 (1989) does not permit ComEd to impose Municipal Taxes or Franchise Costs on those customers which are not located within its corporate limits. It is further undisputed that ComEd unilaterally removed these charges because they were improper. Additionally, ComEd has admitted its wrongdoing in its Motion to Dismiss as well as its arguments in support of that motion. Henceforth, there is no triable issue of fact regarding whether ComEd must refund those Municipal Taxes paid from September 15, 1996 through October 30, 1997 and Franchise Costs paid from April 4, 1995 through October 30, 1997 which were improperly charged by ComEd and paid by Inland. Furthermore, the Illinois Administrative Code as well as the Public Utilities Act mandates that refunds of improper charges must include payment of interest to be determined pursuant to Section 280.70(e)(1).

WHEREFORE, for the forgoing reasons, Complainant Inland Paperboard and Packaging, Inc. f/k/a Inland Container Corp. respectfully moves the Illinois Commerce Commission to grant summary judgment in its favor and against respondent, Commonwealth Edison Corporation for

payments made on improper Municipal Tax charges from September 15, 1996 through October 30, 1997 and for payments made on improper Franchise Costs charges from April 4, 1995 through October 30, 1997; and to impose interest on these refunds pursuant to 83 Ill. Adm. Code § 280.70(e)(1).

Respectfully submitted,

INLAND PAPERBOARD AND PACKAGING, INC.
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